

FILED
AUG 12 1993

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In The
Supreme Court of the United States

October Term, 1993

ABF FREIGHT SYSTEM, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

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October 4, 1989	Answer to Complaint and Notice of Hearing
October 16, 1989	Order Consolidating Cases
December 18, 1989	First Amended Answer to Complaint and Notice of Hearing
December 26, 1989	Motion for Summary Judgment and Supporting Brief
December 29, 1989	Response in Opposition to Respondent's Motion for Summary Judgment
December 30, 1989	Reply to Region 28's Response in Opposition to Motion for Summary Judgment
January 2, 1990	Motion for Severance and for Continuance
January 4, 1990	General Counsel's Opposition to Respondent's Motion for Severance and Continuance
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January 6, 1990	Second Amended Answer to Complaint and Notice of Hearing
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March 12, 1990	Reply Brief of Respondent ABF Freight System, Inc.

March 21, 1990	Order Transferring Proceeding to the National Labor Relations Board
March 21, 1990	Decision NLRB
April 18, 1990	Respondent's Statement of Exceptions to Decision and Order of the Administrative Law Judge and Brief in Support of Exceptions
June 19, 1990	Charging Party Michael Manso's Statement of Cross-Exceptions and Brief in Support
June 19, 1990	Charging Parties' Response to Respondent's Statement of Exceptions to Decision and Order of the Administrative Law Judge and Brief in Support of Exceptions
June 25, 1990	Motion to Strike Cross-Exceptions and Brief in Opposition to Motion for Reconsideration
July 13, 1990	Respondent's Answering Brief and Supplemental Motion to Strike Charging Party Manso's Statement of Cross-Exceptions and Brief in Support
August 27, 1991	Decision and Order
February 3, 1992	Application for Enforcement of an Order of the National Labor Relations Board
February 13, 1992	Docketing Statement
February 20, 1992	Respondent's Answer
March 14, 1992	Brief of Respondent ABF Freight System, Inc.

May 18, 1992	Brief for the National Labor Relations Board
June 15, 1992	Reply Brief of Respondent ABF Freight System, Inc.
July 14, 1992	Reply Brief for the NLRB
December 29, 1992	Tenth Circuit Decision
January 29, 1993	Motion To Stay Mandate
March 23, 1993	Petition for a Writ of Certiorari
June 14, 1993	Writ Granted

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC.

and

Case 28-CA-9500

MICHAEL MANSO, an Individual

ANDY TRUJILLO, an Individual

MICHAEL MANSO, an Individual

Case 28-CA-9916

ORDER CONSOLIDATING CASES

On September 21, 1989, a Complaint and Notice of Hearing issued in Case 28-CA-9500 scheduling a hearing in that matter for November 7, 1989, at 9 a.m. (MST), and continuing on consecutive days thereafter until concluded, in the Hearing Room, National Labor Relations Board, Patio Plaza Building, Upper Level, 5000 Marble Avenue NE, Albuquerque, New Mexico. On October 5, 1989, the hearing in Case 28-CA-9500 was rescheduled to December 12, 1989, at the same time and place.

On October 13, 1989, a Complaint and Notice of Hearing issued in Case 28-CA-9916, scheduling a hearing in that matter for December 12, 1989, at 9 a.m. (MST), in the Hearing Room, National Labor Relations Board, Patio Plaza Building, Upper Level, 5000 Marble Avenue NE, Albuquerque, New Mexico.

The General Counsel of the National Labor Relations Board, by the undersigned, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that Case 28-CA-9500 and Case 28-CA-9916 be, and the same hereby are, consolidated for hearing.

Dated at Phoenix, Arizona, this 13th day of October, 1989.

/s/ Roy H. Garner
Roy H. Garner,
Regional Director

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC.,)		CASE NOS.
Respondent,)		28-CA-9500
and)		and
MICHAEL MANSO and)		28-CA-9916
ANDY TRUJILLO,)		
Charging Parties.)		

RESPONDENT'S POST-HEARING BRIEF

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Dated: February 10, 1990

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* * *

F. Use Of Preferential Hire List Since April 1989.

34. The six casuals that ABF recalled to the casual list in April 1989 are Arnold Haynes, Michael Manso, Jerry Miera, Albert Miranda, Chad Sullins, and Andy Trujillo. Mr. Miera and Mr. Miranda did not respond to ABF's letter and never returned to work.

36. Messrs. Haynes, Sullins, and Trujillo did return to work and remain on the preferential hiring list for casuals. (A. Haynes ty., Tr. 210-211; C. Sullins ty., Tr. 195; A. Trujillo ty., Tr. 221).

35. ABF presently has seven employees on the preferential hiring list and, at the time of the hearing, two other casuals were being processed for placement on the preferential hiring list. For ABF, Article 60, § 4(e) has satisfied its purpose of creating a more readily available supply of extra labor to accommodate the variable workload and of reducing the amount of time spent by supervisors on the dock in contacting casuals when extra help is needed. (E. Fultz ty., Tr. 417).

G. Events Leading To Termination Of Michael Manso In August 1989.

36. Michael Manso returned to work in April 1989. When Mr. Manso and the other casuals returned to work, ABF sent them a letter explaining the five daily start times. (E. Fultz ty., Tr. 425-426). Mr. Manso was unavailable for call on one occasion before the start-time notice was mailed, and he was not written up or disciplined on that occasion. (E. Fultz ty., Tr. 437, 439).

37. On May 8, 1989, Mr. Manso again did not answer a report to work call. He was mailed a written warning and told that a future occurrence could result in his termination. (RX 12; E. Fultz ty., Tr. 437-439).

38. Mr. Manso was again unavailable for call on June 19, 1989, and at that time was terminated as a casual employee. Mr. Manso filed a grievance over that incident and at the grievance hearing explained, for the first time, that his telephone was out of service. The Grievance Committee commuted Mr. Manso's discipline to a suspension without pay. (RX 14; E. Fultz ty., Tr. 439-440; M. Manso ty., Tr. 122-123).

39. The next disciplinary incident involving Mr. Manso was on August 11, 1989. That day, Mr. Manso arrived for work four minutes late and was issued a warning letter for tardiness. Mr. Fultz visited with Mr. Manso at that time and told him that he should be aware that future incidences of tardiness could result in termination. (E. Fultz ty., Tr. 440-443; RX 16).

40. Mr. Manso was late for work again on August 17, 1989. His shift was to begin at 5:00 a.m. that day and, at 5:25 a.m., he called the terminal to report that his car had stalled on the freeway. Mr. Manso arrived at the terminal at approximately 5:50 a.m. that morning. (E. Fultz ty., Tr. 447; M. Manso ty., Tr. 126-130).

41. When he arrived at the terminal that morning, Mr. Manso met with Dock Foreman Tom McNutt. Mr. McNutt filled out a corrective interview sheet, as dock foremen are required to do every time there is a tardiness, explaining that Mr. Manso was late because his car broke down on the freeway and also stating that Mr. Manso had

been offered assistance by Officer Derryl Smith of the Bernalillo County Sheriff's Department. Mr. Manso testified that he refused to sign the corrective interview sheet because he had not been offered assistance by Officer Smith. The meeting between Mr. Manso and Mr. McNutt became very heated and resulted in yelling, according to Mr. Manso, and Mr. Manso then asked for permission to speak to his shop steward and was given permission to do so. (M. Manso ty., Tr. 131-133).

42. Later in the morning of August 17, Mr. Manso was called into a meeting with Branch Manager Mike Long and Operations Manager Ed Fultz. Mr. Manso was evasive and did not want to explain why he was late for work that day. In a meeting with Mr. Long, Mr. Fultz, Mr. Manso, and Shop Steward Walter Maestas, Mr. Maestas suggested that ABF call Officer Smith to find out what really happened. (M. Manso ty., Tr. 133-135; E. Fultz ty., Tr. 447-450).

43. Mr. Long and Mr. Fultz were suspect of Mr. Manso's explanation for his tardiness and followed up on the suggestion that they contact Officer Smith. After looking into Mr. Manso's explanation for his tardiness, Mr. Long and Mr. Fultz concluded that his explanation was not legitimate and that his tardiness was not excused. (E. Fultz ty., Tr. 448-450).

44. Mr. Manso was terminated by ABF effective August 21, 1989. (RX 17). Mr. Manso grieved his termination, and the case was heard by the Arizona-New Mexico Joint State Committee. The Grievance Committee overruled Mr. Manso's grievance. (M. Manso ty., Tr. 153-154).

45. Mr. Manso was the first casual on the preferential hire list to be tardy and there is no evidence that any casuals on the preferential hire list have been tardy on two or more occasions. Four casuals on the preferential hire list, in addition to Mr. Manso, have been terminated for a second occurrence of failure to protect start time by being unavailable when being called to work. They are Albert Miranda, Rick Tingley, Greg Clark, and Tim Connelly. (Tr. 427-434; RX 11).

III.

CASE NO. 9500 - ARGUMENT AND AUTHORITIES

Evidence presented at the hearing in this unfair labor practice case proved one thing beyond all others: the real dispute in this case involves interpretation of a collective bargaining agreement. Representatives of Local 492 and ABF uniformly testified that ABF's treatment of the casuals named in the Complaint and in the grievance was the consequence of an honest difference of opinion between the union and the company over requirements of new language in the Western States Agreement. ABF did not retaliate or discriminate against Charging Parties or other casuals because they engaged in

* * *

IV.

CASE 9916 – ARGUMENT AND AUTHORITIES

In its Complaint in Case No. 28-CA-9916, Region 28 alleges that ABF terminated Michael Manso from work as a casual on August 17, 1989 because he gave testimony in Case 9500. At the hearing, however, no evidence was presented to support this claim, or to support a finding that Respondent's treatment of Manso in any manner violated LMRA §§ 8(a)(1), (3), or (4). Far from it, the evidence showed: (1) that ABF has terminated other similarly situated preferential casuals; (2) that ABF has continued to employ other bargaining unit employees who filed unfair labor practice charges; and (3) that nobody involved in the decision to terminate Manso's employment knew he had filed an unfair labor practice charge or given testimony to the Board.

A. Evidence In The Record Does Not Support A Finding That Discriminatory Or Retaliatory Considerations Entered Into The Decision To Discontinue Manso's Use As A Casual.

Mike Manso was late for work on August 11 and August 17 last year – that fact is undisputed. Also undisputed is the fact that the Grievance Committee found that ABF had just cause to quit using Manso as a casual. (M. Manso ty., Tr. 153-154; E. Fultz ty., Tr. 476-479; RX 16, 17).

* * *

C. Manso Is Not A Credible Witness.

Rarely does a witness under oath speak as transparent a lie as did Michael Manso. To cover up his unexcused tardiness on August 17, 1988, Mr. Manso explained to ABF and testified in the hearing that his car broke down on the freeway while on his way to work, that he walked from the freeway across an arroyo to a service station, that he called his wife at home, that his wife picked him up at the service station, that he took the wheel and began driving from the service station to ABF's terminal, and that on the way to work he was pulled over for speeding. Mr. Manso testified that his wife was with him when he was pulled over. (M. Manso ty. Tr. 152).

Mr. Manso's version of events is implausible from a timing standpoint,¹⁷ and his testimony that his wife picked him up at the service station and was with him when he was pulled over for speeding is an outright lie. Mr. Manso's wife was present in the hearing room and could have corroborated his story, but she did not do so.

¹⁷ On cross examination, Manso testified that it is about 10-15 minutes from his house to the spot where his car broke down on August 17. He further testified that he called ABF at 5:25 a.m. that morning from a service station, and then called his wife at home. His wife then got out of bed, got in the car, and made the 10-15 minute drive to the service station where Manso supposedly was waiting. He then took the wheel and after getting back on the freeway for the remaining 10 minutes or so drive to the terminal, he was pulled over for speeding. Nevertheless, Manso made it to the terminal by 5:50 a.m. (M. Manso ty., Tr. 152-153). The timing of events as described by Manso is highly implausible, if not impossible.

(M. Manso ty., Tr. 507). Further, Officer Derryl Smith of the Bernalillo County Sheriff's Department testified Manso was alone when he was pulled over for speeding, not with his wife. (Officer Smith ty., Tr. 512-513).

On the subject of Article 60, § 4(e) waivers, Mr. Manso's testimony was controverted by another witness with no interest in the outcome of this case - Mr. Bob Herrington. Mr. Herrington was Operations Manager for a period ending in January 1988, but he has not worked for ABF since then and he had no involvement in the termination of Mr. Manso. (B. Herrington ty., Tr. 493-494). Mr. Manso testified that he called Mr. Herrington on at least one occasion to see if ABF would let him sign a waiver of automatic processing for preferential hire status, but Mr. Herrington flatly denied that Manso ever made such an attempt. (M. Manso ty., Tr. 106-107; B. Herrington ty., Tr. 498).

According to Manso, when he returned to work, Operations Supervisors Kyle Beeson, Chris Lovato, and Thomas McNutt separately approached Mr. Manso and made comments to the effect that ABF was out to get him. (M. Manso ty., Tr. 109-115).¹⁸ There was no corroboration of Mr. Manso's testimony. On the other hand, Supervisors Beeson, Lovato, and McNutt all testified consistently and without contradiction by others that they did not make

¹⁸ Even if Mr. Manso could be believed, the comments he attributes to Messrs. Beeson, Lovato, and McNutt are immaterial. There is no evidence that these supervisors were involved in the decision to discharge Manso, nor is there evidence that the alleged comments by these supervisors were based on things said by the decision makers.

the statements attributed to them by Mr. Manso. (K. Beeson ty., Tr. 404-405; C. Lovato ty., Tr. 379-380; T. McNutt ty., Tr. 410).

Plainly, Manso's credibility as a witness is negligible. His testimony was directly contradicted by witnesses with no interest in the outcome of this case and his version of events is largely inconsistent or exaggerated in contrast to the testimony of all other witnesses. Even if Charging Party could be believed, however, there is not sufficient grounds in what he said to support a finding that ABF has discriminated or retaliated against him.

D. As A Matter Of Law, Manso Is Not Entitled To Reinstatement Or Backpay

Section 10(c) of the NLRA, 29 U.S.C. § 160(c) provides that no order by the Board shall require reinstatement of an employee or payment of backpay to an individual discharged for cause. As the record indicates, Manso was discharged for cause. Manso grieved his discharge, but it was upheld by the grievance committee. See *Owens v. Texaco, Inc.*, 857 F.2d 262, 265 (5th Cir. 1988) (arbitral decision is final and binding as to questions of rights under contract). Thus, contrary to the General Counsel's contention, Manso is not entitled to reinstatement or backpay.

V.

CONCLUSION

There is no evidence to support a finding that ABF engaged in unlawful conduct as alleged by Region 28 in

Case Nos. 28-CA-9500 and 9916. What the evidence does show, very clearly, is that ABF has tried to comply with new language in the Western States Agreement creating a category of employee that did not exist before. The employment practices challenged in Case Nos. 9500 and 9916 involve interpretation and application of the new contract language, and the issues have been appropriately resolved through the contractual grievance procedure.

In closing, Counsel for the General Counsel did not prove substantive allegations in the Complaints. Rather, the evidence presented by the Counsel for the General Counsel supports no claim by General Counsel with the possible exception that he disapproves with ABF's adherence to new provisions in the labor contract and the Grievance Committee's application of the new contract language. The unfair labor practice claims in Case Nos. 9500 and 9916 are unsubstantiated and should be dismissed.

DATED this 10th day of February, 1990.

Respectfully submitted,

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/s/ John V. Jansonius
John V. Jansonius

ATTORNEYS FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of Respondent's Post-Hearing Brief are being served on all counsel of record, Charging Parties, and the Resident Officer of NLRB Region 28 in Albuquerque by first class United States mail, postage prepaid, on the final date for filing post-hearing briefs set by the Administrative Law Judge in these consolidated cases.

/s/ John V. Jansonius

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

ABF FREIGHT SYSTEM, INC.)		
Respondent,)	Case Nos.	
)	28-CA-9500	
and)	and	
)	28-CA-9916	
MICHAEL MANSO and)		
ANDY TRUJILLO,)		
)		
Charging Parties.)		
)		

REPLY BRIEF OF RESPONDENT ABF
FREIGHT SYSTEM, INC.

TO: The Honorable Walter H. Maloney, Jr.
Administrative Law Judge
Division of Administrative Law Judges
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
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SUBMITTED BY:

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DATED: February 28, 1990

* * *

9. General Counsel's Brief, p. 14, ¶ 1.

Turning to Case 9916, Counsel for the General Counsel recites Charging Party Manso's testimony about comments allegedly made by Dock Foremen Kyle Beeson, Chris Lovato, and Tom McNutt. These comments, even if they had been made, have no probative value.

First, Counsel for the General Counsel failed to put on testimony showing that the alleged comments by Foremen Beeson, Lovato, and McNutt were based on information from the individuals responsible for the decision to terminate Mr. Manso. It is uncontroverted that these Foremen were not involved in that decision. (See facts and record cites stated on pages 40, 42-43 of Respondent's Post-Hearing Brief). Another point: the alleged comments by Messrs. Beeson, Lovato, and McNutt are innocuous as to the issue of motive. There is no evidence in the record to suggest that the Foremen knew anything about Manso's involvement in an unfair labor practice case and there certainly is nothing to suggest that the Foremen or ABF disapprove of employees' resorting to the grievance procedure or to the NLRB. Third, in response to Counsel for the General Counsel's suggestion that Manso is credible, Respondent urges that Messrs. Beeson's, Lovato's, and McNutt's unequivocal denial that they made the comments attributed to them by Mr. Manso are immeasurably more reliable than the uncorroborated testimony of a single witness with an interest in the outcome of the case whose testimony on at least one specific fact has been shown beyond any reasonable doubt to be false.

(See facts and record cites on pages 41-43 of Respondent's Post-Hearing Brief).

10. General Counsel's Brief, p. 15, ¶ 1.

Here, the General Counsel stridently urges that the Arizona-New Mexico Joint State Committee "saw through the Respondent's flimsy artifice," and ordered that Manso be returned to work after he was removed from the preferential hiring list for unavailability for call in June 1989. Counsel for the General Counsel neglected to point out that the Joint State Committee sustained ABF's discipline to the extent of suspending Mr. Manso without pay. (E. Fultz ty., Tr. 439-440, RX 14). Mischaracterization of this incident by Counsel for the General Counsel is further evident in the fact that other casuals have been let go for precisely the same reason. (See facts and record references on pages 38-39 of Respondent's Post-Hearing Brief).

11. General Counsel's Brief, pp. 15-16.

With no effort to support his argument, Counsel for the General Counsel states that "[T]he record is in fact replete with examples of the application of a more stringent policy for Michael Manso than for other employees." This just isn't so. No evidence was presented concerning employees similarly situated to Charging Party that have been treated more leniently than he. Further, Counsel for the General Counsel ignores the uncontroverted testimony that several employees have filed grievances and/

or unfair labor practice charges without adverse consequence to their continued employment at ABF.

In short, Counsel for the General Counsel has not satisfied his burdens of proof in Case Nos. 28-CA-9500 and 9916 and, as further explained in Respondent's Post-Hearing Brief filed on February 12, 1990, the Complaint in Case Nos. 28-CA-9500 and 9916 should be dismissed.

Respectfully submitted,
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John V. Jansonius

ATTORNEYS FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Reply Brief of Respondent ABF Freight System was served by first class United States mail, postage pre-paid, addressed to the following persons on the 28th day of February, 1990:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ABF FREIGHT SYSTEM, INC.,	§	
Respondent,	§	Case Nos.
	§	28-CA-9500 and
and	§	28-CA-9916
	§	
MICHAEL MANSO, an	§	
individual, and	§	
ANDY TRUJILLO,	§	
an individual,	§	
	§	
Charging Parties.		

RESPONDENT'S ANSWERING BRIEF AND SUPPLE-
MENTAL MOTION TO STRIKE CHARGING PARTY
MANSO'S STATEMENT OF CROSS-EXCEPTIONS AND
BRIEF IN SUPPORT

Respondent ABF Freight System, Inc. ("Respondent" or "ABF") files this Answering Brief And Supplemental Motion to Strike and would show that Charging Party Manso's cross-exception is without merit and does not conform to requirements of the NLRB's Rules and Regulations:

I.

ANSWERING BRIEF

Charging Party Manso's exception to the ALJ's finding that his termination on August 17, 1989 did not violate the Act is based on a false premise, is contrary to facts established in the record, and fails to substantiate grounds for disregarding the ALJ's recommendation that

Michael Manso's termination from employment be upheld. (ALJD: 16:46-49; Manso Cross-Exception, p. 1).

A. Manso's Cross-Exception Is Contrary To Facts Established In The Record.

The following facts were proved by uncontroverted evidence at the hearing and establish that Charging Party was terminated for cause:

1. It is undisputed that Mike Manso was late for work on two (2) occasions in August 1989. On August 11, Mr. Manso arrived for work four (4) minutes late and was issued a warning letter for tardiness. Mr. Fultz visited with Mr. Manso at that time and told him that he should be aware that future instances of tardiness could result in termination. (E. Fultz ty., Tr. 440-443; RX 16).

2. Despite Mr. Fultz's warning to Mr. Manso, Mr. Manso was again late for work on August 17. His shift was to begin at 5:00 a.m. that day and it is undisputed that at 5:25 a.m., he called the terminal to report that his car had stalled on the freeway. Mr. Manso arrived at the terminal at approximately 5:50 a.m. that morning. (E. Fultz ty., Tr. 447; Manso ty., Tr. 126-130). After Manso arrived at the terminal he met with Dock Foreman Tom McNutt. Mr. McNutt filled out a corrective interview sheet, as dock foreman are required to do everytime there is a tardiness. The corrective interview sheet stated that Manso was late to work because his car broke down on the freeway and that Officer Derryl Smith of the Bernalillo County Sheriff's Department had assisted Mr. Manso. Mr. Manso refused to sign the corrective interview sheet. The meeting between Mr. Manso and Mr.

McNutt became very heated and resulted in yelling. According to Manso, he then asked for permission to speak to a Shop Steward and was given permission to do so. (M. Manso ty., Tr. 131-133).

3. Later in the morning of August 17, Manso was called to a meeting with Branch Manager Mike Long and Operations Manager Ed Fultz. When Manso was asked why he was late for work, Manso was evasive and would not explain the cause of his lateness. In a meeting with Mr. Long, Mr. Fultz, Mr. Manso and Shop Steward Walter Maestas, Mr. Maestas suggested that ABF call Officer Smith to find out what really happened. (M. Manso ty., Tr. 133-135; E. Fultz ty. Tr. 447-450).

4. Mr. Long and Mr. Fultz were suspect of Mr. Manso's explanation for his tardiness (which he had previously provided to Mr. McNutt). For this reason they followed up on Shop Steward Maestas' suggestion that they contact Officer Smith. After speaking with Officer Brads and obtaining a statement from Officer Smith, Mr. Long and Mr. Fultz concluded that Mr. Manso's explanation was not legitimate. Thus his tardiness was not excused. (E. Fultz ty., Tr. 447-452, 478, 479).

5. Manso was terminated by ABF effective August 21, 1989. (RX 17). Mr. Manso grieved his termination, and the case was heard by the Arizona-New Mexico Joint State Committee. The grievance committee overruled Mr. Manso's grievance. (M. Manso ty., Tr. 153-154).

B. The Premise of Manso's Cross-Exception Is Erroneous.

In his cross-exceptions, Mr. Manso concedes that he lied on August 17, 1989, and at the hearing in this case, when asked to explain the reason for his tardiness. Mr. Manso argues, however, that lying was not a factor in the decision to terminate him. Charging Party contends that ABF did not fire him for lying and that the ALJ's decision should be remanded to determine whether ABF's proffered reason for discharge (i.e., unexcused tardiness) was pretextual.

Mr. Manso's argument is erroneous for two reasons. First, Manso's lack of candor was inherently relevant to the decision to terminate for tardiness. Second, ALJ Maloney determined that ABF's reason for discharging Manso was legitimate and there is no issue left for the ALJ to decide.

The record shows that ABF was suspicious of Mr. Manso's excuse for being late for work, prompting ABF to investigate the matter further. ABF's suspicion that Mr. Manso's car had not overheated was validated by Officer Smith of the Bernalillo County Sheriff's Department, who pulled Mr. Manso over for speeding on August 17 while on his way to work. Operations Supervisor Ed Fultz testified that, *if* Mr. Manso had a *legitimate* excuse (i.e., if his car had truly overheated), he would not have been discharged. Specifically, the record reveals:

ALJ Maloney: Tell me, was he being discharged for tardiness, or was he being discharged for tardiness without having a legitimate excuse?

Mr. Fultz: Well, he was being discharged for tardiness, but obviously the fact that he did not have a legitimate excuse played upon this particular offense.

ALJ Maloney: *If he had a legitimate excuse, he would not have been discharged?*

Mr. Fultz: *He would not have been discharged.*

ALJ Maloney: Did all three of you agree, you, Mr. Long and Mr. Johnson, agree, in effect, he was lying when he concocted this story?

Mr. Fultz: I believe we did. And I will add to that if I may.

ALJ Maloney: Yeh.

Mr. Fultz: There was actually some discussion of his dishonesty in this particular incident.

ALJ Maloney: Alright. That's all I wanted to know.

(Tr. 481-482 lines 6-25, 1-2) (emphasis supplied).

Mr. Manso further argues that his lies were not factors in the decision to terminate him because "Fultz felt it unnecessary to confront Manso with his belief that Manso lied. . . ." (Cross-Exceptions, p. 2). That is irrelevant. Mr. Fultz already had met with Mr. Manso to discuss his "excuse" and to give him an opportunity to substantiate it. (Fultz ty., Tr. 447).

It was Mr. Manso who mentioned that Officer Smith was a witness to his lateness. On the Union Steward's suggestion, the Sheriff's Department was contacted to corroborate Manso's story. After speaking with Officer Brads and obtaining a statement from Officer Smith, it

was apparent that Mr. Manso's excuse for being tardy was a fabrication. (Fultz Ty., Tr. 447-452, 478, 479). Mr. Fultz was not obligated to give Mr. Manso a second opportunity to come up with an excuse.

In summary, Manso's lie about car trouble goes to the heart of the issue; to wit, did Mr. Manso have a legitimate excuse for being late to work? The ALJ properly found that he did not. Thus, ABF had just cause to terminate Mr. Manso. ABF cannot be held to have violated sections 8(a)(3) or 8(a)(4) of the NLRA when the evidence shows that protected activity was not the reason for the discharge.

C. Manso Was Properly Disciplined Under The Collective Bargaining Agreement.

Manso contends that ABF instituted an "ad hoc" rule on discharge of preferential casuals after Manso had incurred two (2) tardys. (Cross-Exceptions, p.2). Based on the record, Manso's argument is without merit. First, evidence clearly established that the disciplinary rules applied to preferential casuals were not "ad hoc", but in fact are set forth in the collective bargaining agreement. When it comes to discipline, the Western States Agreement (Article 46, § 1) expressly allows for one warning letter and then a discharge. (Fultz ty., Tr. 444).

Second, the decision to discipline preferential casuals for tardiness or failure to report to work was made *prior to* Manso having incurred two (2) tardys (Fultz ty., Tr. 441).

Third, the Arizona-New Mexico Joint State Committee found that ABF had just cause to discharge Mr. Manso pursuant to company disciplinary rules (Manso ty., Tr. 153-154). The grievance committee also sustained the discharge of several other casuals terminated for similar violations. (Fultz ty., Tr. 427-434). See *Owens v. Texaco, Inc.*, 857 F.2d 262, 265 (5th Cir. 1988) (arbitral decision is final and binding as to rights under labor contract).

Finally, Manso's cross-exceptions do not identify evidence mandating a finding that ABF violated sections 8(a)(3) or (4) of the NLRA. In contrast, uncontroverted testimony at the hearing proved that other employees who have filed grievances and/or unfair labor practice charges have remained employed by ABF. (Hatfield ty., Tr. 360-361). Even Manso's co-Charging Party, Mr. Andy Trujillo, has remained employed without discipline.

D. Charging Party's Cross-Exception Seeks Relief That Would Be Contrary To Sound Public Policy.

Charging Party Manso fabricated an excuse for his tardiness on August 17, 1989 and he testified untruthfully about his excuse at the hearing in this case. ALJ Maloney so found, and there is no plausible basis for challenging that finding. The Act does not reward perjury and a decision allowing Charging Party to benefit by his inaccuracy to ABF and the Board would undermine legal process.

II.

SUPPLEMENTAL MOTION TO STRIKE

Mr. Manso's Cross Exceptions and Brief in Support do not comply with Section 102.46 (b),(c) of the NLRB's Rules and Regulations. Charging Party did not specifically identify the questions of procedure, fact, law and policy to which exception is taken. Further, Mr. Manso has not designated by page citation the portions of the Record relied upon. Finally, the Brief in Support of Exceptions improperly omits a clear and concise statement of the case. In light of the deficiencies, and for the reasons set forth in ABF's separately filed Motion to Strike Cross Exceptions and Brief in Opposition to Motion for Reconsideration, Respondent requests that Manso's Cross-Exceptions be stricken.

III.

CONCLUSION

The ALJ properly found that Mr. Manso's discharge was for cause. Similarly situated employees who twice failed to protect their start times were also terminated and the Grievance Committee sustained these decisions by ABF. There is no evidence that ABF treated Manso adversely because he filed a charge with the NLRB or because he provided testimony to the NLRB. In contrast, undisputed evidence shows that other employees who have filed charges against ABF continue to be employed by ABF.

WHEREFORE, ABF Freight System, Inc. prays that Charging Party Manso's Cross-Exceptions be denied, that

the portion of the ALJ's Decision and Order of March 21, 1990 dismissing the Complaint in Case No. 28-CA-9916 and finding that ABF did not violate section 8(a)(1), (3) or (4) when it discharged Michael Manso be approved, and that the ALJ's recommendations concerning Manso's August 1989 termination be adopted. Alternatively, ABF moves that Charging Party Manso's Cross-Exceptions be stricken for untimeliness and non-compliance with the NLRB's Rules and Regulations.

Respectfully submitted,
HAYNES AND BOONE
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/s/ John V. Jansonius
John V. Jansonius

ATTORNEY FOR RESPONDENT
ABF FREIGHT SYSTEM, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and copy of the foregoing instrument was served by first class United States Mail, postage prepaid addressed to the following persons on the 13th day of July, 1990:

Mr. Lewis S. Harris
Counsel for the General Counsel
National Labor Relations Board
Region 28, Albuquerque Resident Office
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Albuquerque, New Mexico 87110

Steven V. French
Walz & French, P.A.
510 Slate Avenue, N.W.
Albuquerque, New Mexico 87102

/s/ John V. Jansonius
John V. Jansonius

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 14, 1993

Mr. John Victor Jansonius
3100 NationsBank Plaza
901 Main Street
Dallas, TX 75202-3789

Re: ABF Freight System, Inc.
v. National Labor Relations Board
No. 92-1550

Dear Mr. Jansonius:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted, limited to Question 3 presented by the petition.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

EXHIBIT R 18

I stopped Mike Manso between 530 and 540 AM on Thursday morning 8/17/89 on I40 at approximately the Louisiana exit. I paced him for 3 miles between 85 and 95 miles per hour weaving in and out of traffic. I stopped Mr. Manso and talked to him and verified it was him through his drivers license. Mr. Manso left. I followed him past Carslile and there was no evidence of car trouble.

/s/ Derryl Smith D1/c #D581

WESTERN STATES AREA
SUPPLEMENTAL
AGREEMENTS

COVERING

PART I

Common Clauses

PART II

Pick-Up and Delivery
Local Cartage and Dock Workers

PART III

Over-the-Road Motor Freight

PART IV

Automotive Shop and Truck Servicing

PART V

Office Employees

For the Period of

APRIL 1, 1988

thru

MARCH 31, 1991

* * *

G.C. 22

ARTICLE 46**GENERAL DISCHARGE OR SUSPENSION****Section 1.****Cause for Discharge or Suspension**

Subject to the provisions of Article 8 of the National Agreement the Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Local Union affected; except that no warning notice need be given to an employee before he is suspended or discharged if the cause of such suspension or discharge is (a) Dishonesty; (b) Drunkenness; (c) Recklessness resulting in a serious accident while on duty; (d) The carrying of unauthorized passengers; (e) Unprovoked physical assault on an employee or customer; (f) Selling, transporting or use of illegal narcotics and/or controlled substances while on duty; (g) Willful, wanton or malicious damage to the Employer's property; (h) Proven negligence resulting in serious equipment damage while on duty; (i) For the specific reasons provided under Article 35, Sec. 3 of the National Master Freight Agreement.

Section 2.**Warning Notices**

(a) A warning notice shall not remain in effect for a period of more than nine (9) months from the date of occurrence which gave rise to such warning notice. Warning notices, to be considered as valid, must be issued

within ten (10) days exclusive of Saturday, Sunday and holidays after the occurrence of the violation claimed by the Employer in such warning notice. Warning letters shall be specific, not general, in nature as to alleged violation (i.e., time, date, place, and nature of violation).

Discharge or Suspension

(b) Discharge or suspension must be by proper written notice to the employee and the Union affected within ten (10) days exclusive of Saturday, Sunday and holidays of the occurrence of the violation claimed by the Employer as the basis for discharge or suspension, except where dishonesty is involved. In cases where dishonesty is involved the discharge or suspension notice must be within twenty (20) calendar days of the Employer obtaining verifiable evidence of the alleged dishonesty. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove an injustice has been done an employee, he shall be reinstated. The Joint State Committee or the Joint Western Area Committee shall have the authority to order full, partial or no compensation for time lost.

When an employee is suspended, or where a discharged employee is returned to work by decision of any grievance committee or umpire, the Employer shall pay the applicable Health and Welfare and Pension contributions so that there is no break in coverage.

The Joint State Committee or the Joint Western Area Committee shall have the authority in its hearing process to accept or reject any or all arguments pertaining to the

issues in each case, including but not limited to timeliness, whether or not proper before the Committee, etc., and further, to order full, partial, or no compensation for time lost.

(c) At the option of an individual employer, a discharged or suspended employee who is not subject to the specific reasons for discharge set forth in Section 1 above, may be worked during the interim period pending the final adjudication of his protest to such discharge or suspension.

Section 3. Protest Procedure

(a) Warning notices must be protested in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays except as hereinafter provided.

The Joint State Committees presently hearing warning letters shall discontinue such practice effective 7-1-88. This practice shall be subject to review after 7-1-89 and may be grieved thereafter if abused by the Employer. The Local Union and the Employer agree all warning letters shall be considered as automatically protested and shall not be heard until such time as they are used as a basis for suspension or discharge within the effective time period.

(b) Protests to suspension or discharge must be made in writing to the Employer within ten (10) days exclusive of Saturday, Sunday and holidays. If the matter is not resolved to the satisfaction of the parties, either party may file the case with the Joint State Committee as

provided in Article 45, Section 1, of this Supplemental Agreement.

(c) If the employee involved is not within his home terminal area when the warning notice, suspension or discharge is made, the ten (10) day periods referred to in sub-sections (a) and (b) above shall start to run from the date of his return to his home terminal.

Section 4.

Transportation Home

Any employee discharged away from his home terminal shall be provided the fastest available transportation to his home terminal at the Employer's expense.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 28

ABF FREIGHT SYSTEM, INC.

AND

MICHAEL MANSO, an Individual Case 28-CA-9500

ANDY TRUJILLO, an Individual

MICHAEL MANSO, an Individual Case 28-CA-9916

TRANSCRIPT OF PROCEEDINGS

Tuesday, January 9, 1990

5000 Marble Avenue, Northeast
Albuquerque, New Mexico

APPEARANCES:

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* * *

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* * *

[p. 404] having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: My name is Kyle Beeson, and my address is 5727 Lost Dutchman Street, Northeast.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Beeson?

A. I work at ABF Freight.

Q. What is your job there?

A. Operations supervisor.

Q. How long have you worked at ABF?

A. Been with the company a total of approximately five and a half, six years.

Q. Were you involved in the decision to quit using Michael Manso as a casual on the preferential hire list last summer?

A. No, I wasn't.

Q. Do you recall when Mr. Manso returned to work in approximately late April or early May of 1989?

A. Yes.

Q. At that point in time did you have any [p. 405] conversations with Mr. Manso?

A. Pertaining to -

Q. Well, did you tell Mr. Manso that ABF was out to get him?

A. No, I did not.

Q. Did you say to Mr. Manso, "Let's see how long it takes ABF to get you this time"?

A. No.

Q. Did you ever threaten Mr. Manso that he was going to be terminated or disciplined in some manner?

A. No.

MR. JANSONIUS: Nothing else, Your Honor.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Beeson, my name is Lewis Harris, and I'm an attorney with the National Labor Relations Board. I'm going to ask you a couple questions.

When Mr. Manso came back to work, you knew that he had filed an unfair labor practice charge against the company, didn't you?

A. No.

Q. You didn't know that?

You knew that he filed a grievance against the company?

A. Yes.

* * *

[p. 407] A. I really didn't know how far it went.

Q. You knew that he was coming back as a result of having filed a grievance, right?

A. Yes. Yes.

Q. Is the answer yes?

A. Yes.

Q. Did you have any discussion with him when he came back to work about his coming back to work?

A. Just said, "Welcome back."

Q. That's the entire conversation you had with him about his having gotten back to work?

A. (Witness nods head.)

Q. You have to say yes or no.

A. Yes.

Q. You did know that he had been terminated by ABF, right?

A. Yes.

MR. HARRIS: That's all I have.

MR. MALONEY: Thank you.

Do you have anything further?

MR. JANSONIUS: No, Your Honor, I do not.

MR. MALONEY: Step down.

MR. JANSONIUS: If I might have a couple minutes, I do have two witnesses out in the hallway, and -

* * *

EXCERPTS OF RONALD G. FORD

* * *

[p. 384] MR. JANSONIUS: They're not going to take long. And I've instructed Mr. Fultz to come down with them.

MR. MALONEY: So you can take care of Fultz this morning, as well?

MR. JANSONIUS: I believe so.

MR. MALONEY: All right. So there will be Fultz and these two people?

MR. JANSONIUS: That's correct.

MR. MALONEY: All right. So this afternoon we'll have Herrington and this policeman?

MR. JANSONIUS: That's correct. And it's possible that Mr. Fultz will spill over until this afternoon.

Your Honor, we've told everybody to get here ASAP and be available.

MR. MALONEY: Call your next witness.

MR. JANSONIUS: Your Honor, I call Ron Ford.

MR. MALONEY: Raise your right hand.

RONALD G. FORD

having been first duly sworn according to law, upon his oath testified as follows:

[p. 385] MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: My name is Ronald G. Ford, I live at 9010 Alexis Avenue, Southwest.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Ford?

A. ABF.

Q. How long have you worked there?

A. Three years.

Q. What is your present position at ABF?

A. I'm an operations supervisor.

Q. How long have you been an operations supervisor?

A. About two years.

Q. So you were an operations supervisor in the summer of 1989?

A. That's correct.

Q. Did you participate in a phone call to Mr. Michael Manso on June 9 of this past summer to call him to work?

A. Yes, sir.

Q. Would you tell us about that?

A. It was a normal calling. I called all the casuals that I needed for that shift, and when we - [p. 386] when we got to Mike Manso, the teamster who was calling him,

and I was, you know, on the phone listening, there was no answer.

MR. MALONEY: Who called?

THE WITNESS: I believe it was Mr. Motter, Jeff Motter.

MR. MALONEY: Did he do the calling, or did you do the calling?

THE WITNESS: Well, would you like me to explain the system that we utilize?

MR. MALONEY: I'd like you to tell me the answer to my question.

THE WITNESS: Sorry.

MR. MALONEY: Who called? Who did the dialing?

THE WITNESS: Jeff did the dialing.

MR. MALONEY: And who listened in?

THE WITNESS: I did.

MR. MALONEY: So he was actually - you were actually - you actually were a spectator at the conversation?

THE WITNESS: A spectator with the conversation.

MR. MALONEY: All right. Maybe that's an improper way of putting it.

[p. 387] These other people that he called, did he do the dialing?

THE WITNESS: Uh-huh.

MR. MALONEY: Did he speak to the individuals in question?

THE WITNESS: No.

MR. MALONEY: Who did?

THE WITNESS: I do.

MR. MALONEY: You do the speaking, and he listens in?

THE WITNESS: No. I have the receiver in my hand.

MR. MALONEY: Yeah.

THE WITNESS: I watch him as he dials the number.

MR. MALONEY: Yeah.

THE WITNESS: And then when the phone is - you know, when they answer, I'm the one that's doing the calling.

MR. MALONEY: Does he listen in to the conversation?

THE WITNESS: He doesn't listen to the conversation unless, of course, there's a problem. You know, like if there's no answer, then he would listen to that, because he has to verify that there's no answer.

[p. 388] MR. MALONEY: All right. Go ahead.

Q. (BY MR. JANSONIUS) And did he verify that there was no answer on that occasion?

A. Yes, sir.

Q. Did he tell you that he thought he might have misdialed?

A. No, sir.

MR. JANSONIUS: No further questions.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Ford, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and I think I'd like to ask you a few questions.

A. Okay.

Q. Have there been cases that you're aware of where a number has been misdialed when you're calling casuls to work?

A. That I'm aware of, sir?

Q. Yes.

A. I think so.

Q. And if that is the case, do you allow another dialing be made of the correct number?

— A. Yes, sir. The - may I?

The first call is considered invalid at that point, because the individual feels that the right

* * *

[p. 395] A. We - the first call is - that call is considered invalid. Yes, sir.

Q. Do you let him dial again?

A. Yeah.

Q. And you don't recall on the morning of June 9, last year, when a call was made to Mr. Manso that Jeff Motter said, "I think I made a mistake, I want to - can I try it again?"

A. No, sir.

Q. You don't remember that?

A. I don't - he didn't say it.

Q. Did you make out some kind of a report when you learned that Mr. Manso had not answered the call?

A. The call sheet that we utilize for the verification process is the report.

Q. Where does that go after you use it for calling?

A. It goes to the operations manager.

MR. MALONEY: Who is that?

THE WITNESS: Mr. Ed Fultz.

MR. MALONEY: Then is a disciplinary warning of some kind issued?

THE WITNESS: Sir, I - I don't know. I presume so, but I don't know. That's out of my hands.

Q. (BY MR. HARRIS) How many calls do you

* * *

[p. 400] would say that I called nine that day and nine for the three other days that I worked, because I work four on, four off.

MR. MALONEY: Next question.

Q. (BY MR. HARRIS) Did you work from June of '89 until the week before the holidays as an operations supervisor?

A. I believe that's correct. I may have filled in in city dispatch one other time between then and now.

Q. And during that period, from June until a week before the holidays, you were making calls of 15 percenters and preferential casuals and other casuals to come to work?

A. Yes, sir.

Q. And on some of those occasions do you recall that the teamster who was dialing said to you that he thought that he may have dialed the wrong number?

A. No, sir. I don't recall that happening on any of my call periods.

Q. On any of your calls?

A. I don't recall any of that happening. No, sir.

Q. Why do you have such a clear recollection [p. 401] of the call that was made to Mr. Manso on June 9 of last year?

A. Because a verification is, I think, serious enough to where it will bring it - it will keep it in your mind.

MR. MALONEY: Were these other calls that you made that week verified calls?

THE WITNESS: No. I don't think so, sir. I mean this - no. I mean verification is not something that happens very often. Normally you make your calls and people are there and you bring them to work.

Q. (BY MR. HARRIS) Well, you make a verification on all preferential casuals, don't you?

A. Well, yes, sir. But I mean - when I say verification, what I mean to say is that a verification that somebody was not there to receive the call. We term the phrase he was verified because he wasn't available to work.

MR. MALONEY: Are you saying in each and every one of the other calls you made that evening you reached the individual who was called?

THE WITNESS: I believe so. I believe so.

Q. (BY MR. HARRIS) There have been a number of employees - you're aware, aren't you, that there have been a number of employees on the dock who have

* * *

[p. 413] EXCERPTS OF ED FULTZ

* * *

Q. I don't know if you used those exact words, but -

A. Something on that order, in that vein.

MR. HARRIS: That's all I have.

MR. JANSONIUS: Nothing else, Your Honor.

MR. MALONEY: Thank you very much. Step down.

MR. JANSONIUS: Your Honor, my next witness is Ed Fultz. He is going to be on the witness stand considerably longer than these other two gentlemen, or three gentlemen.

MR. MALONEY: Well, we'll see where we go with it. Bring him in.

Come forward, please.

THE WITNESS: Where am I supposed to go?

MR. JANSONIUS: Ed, you're going to be sitting right over here.

MR. MALONEY: Raise your right hand.

ED FULTZ

Having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

[p. 414] THE WITNESS: My name is Ed Fultz, I live at 1844 Tramway Terrace Loop, Northeast, Albuquerque, New Mexico.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. You work at ABF; is that right, Mr. Fultz?

A. Yes, I do.

Q. What do you do there?

A. I'm the operations manager.

Q. How long have you worked for ABF?

A. Five and a half years.

Q. Tell us a little bit about your employment background.

A. Okay. Prior to becoming operations manager, I was an operations supervisor for -

MR. MALONEY: How long have you been operations manager?

THE WITNESS: Since January of '89.

MR. MALONEY: Go ahead.

THE WITNESS: Prior to that I was operations supervisor, from the time I joined ABF until that time. Prior to that I was operations manager for a freight line that went bankrupt, ICX. I was with ICX for approximately five years, also. Prior to that I taught school for ten years.

* * *

[p. 446] we're making it harder in that we're applying the strict letter of the contract.

MR. MALONEY: I know that. But the question is why.

THE WITNESS: Because this is a brand new group of employees that we have never had before, and we want to establish that line of discipline right from the very beginning.

I don't know how else to respond to you, Judge.

MR. MALONEY: Next question.

Q. (BY MR. JANSONIUS) You discontinued using Mr. Manso about a week after that August 11 incident; is that correct?

A. That's correct.

Q. And why did you discontinue using him at that time?

A. Mike was late again.

Q. Would you tell us what happened that day?

A. Okay. When I got there, I was told that Mike was late. And at that point in time I started asking what the situations were. And I suppose that what I remember is that he called in at approximately 5:25, indicated that -

MR. HARRIS: Excuse me, Your Honor. I [p. 447] would suggest that the witness give some foundation for the testimony in regard -

MR. MALONEY: What do you mean foundation?

MR. HARRIS: His information. Who - he said he supposes -

MR. MALONEY: All right.

What time did you report to work; and who told you what?

THE WITNESS: I got to work at 7:30. Okay? Like I said, every time that somebody is late there is supposed to be an Employee Discussion Report written up. There was one written up. It was in my basket.

MR. MALONEY: Who had -

THE WITNESS: Tom McNutt had written the Employee Discussion Report. Joe Kineer, another supervisor, had taken a call from Mike at 5:25 and had clock punched that call in from Mike stating that he had car trouble and would be late to work.

In looking at the Employee Discussion Report, my boss, Mike Long, and myself called Mike into the office, and I believe that there was a union steward present, and asked him to tell us about the circumstances.

Also, on the employee verification - or no, excuse me - the Employee Discussion Report there [p. 448] was a note there that a deputy sheriff had also stopped and offered Mike some aid to his vehicle. But that wasn't - that was all very brief.

So we called Mike in and asked him what were the circumstances.

He said he broke down, that Officer Derryl Smith had stopped and offered him aid, if he could take him to the phone. And he declined, and he ran across the mesa. He had broken down - I can't remember the exact places right now. I think it was somewhere west of San Pedro, somewhere in that area, or west of Louisiana, in that area. Anyhow, he ran across the mesa to a phone booth at a defunct station on Carlisle, and that's where he said he called in from, at 5:25, which is when we had that clock punched.

I asked Mike what time he left home that morning.

He indicated that he did not feel that the time that he left home was relevant to what we were talking about and didn't want to discuss it.

There was some other discussion, the details of which I do not remember that clearly.

Mike indicated that he wanted to -

MR. MALONEY: Do you know how he got to work?

[p. 449] THE WITNESS: I do not know exactly how Mike got to work. No. I can assume how I think he got to work.

MR. MALONEY: How do you assume he got to work?

THE WITNESS: I assume he drove his car on in after some investigation. At that point in time I did not know how he got to work.

MR. MALONEY: Did you find out that that was, in fact, the way he got to work?

THE WITNESS: That's the way I believed. Yes, with subsequent looking into the situation.

At that point in time the discussion pretty much ended, and Mike Long, the boss, said, "Mike, we're going to check into what you said."

And that's where we left it at that point.

MR. MALONEY: Did you think that was a phony excuse?

THE WITNESS: I felt it was evasive. Exactly. I did -

MR. MALONEY: You don't think he had a breakdown?

THE WITNESS: We were suspect he did at that point in time.

Oh, he also said -

[p. 450] MR. MALONEY: You suspected that he did or did not have a breakdown?

THE WITNESS: That he did not.

MR. MALONEY: You don't think he broke down at all?

THE WITNESS: No.

MR. MALONEY: Okay.

THE WITNESS: At that time.

MR. MALONEY: Did you find out subsequently whether he did or did not?

THE WITNESS: Yes.

MR. MALONEY: What did you find out subsequently?

THE WITNESS: That he didn't.

MR. MALONEY: He did not have a breakdown, no breakdown at all?

THE WITNESS: The way we understood it from what we found out.

MR. MALONEY: He had no trouble at all?

THE WITNESS: (Witness shakes head.)

MR. MALONEY: All right. Go ahead.

Q. (BY MR. JANSONIUS) Were you ever given any repair records on his car?

A. No.

Q. What did you do to follow-up on his [p. 451] statement that his car had broken down?

A. Subsequent to that my boss went out and checked on the freeway to see if the car was still there, and there was no car in that area.

We also called the deputy sheriff, and I got an Officer Brads at the dispatch, and I related to Officer Brads that I'd like to speak to Officer Smith, get a message to him, if you would.

And he got a message to him, and there was some two-way conversation. And evidently I had asked Officer Brads if he would ask Officer Smith if he had rendered aid to Mike.

And he said no, he had not rendered aid to Mike, that he stopped him for speeding.

Subsequent to that we made an effort to go and get a statement from Officer Smith, which we did.

MR. MALONEY: How did you go about doing that?

THE WITNESS: We contracted again the deputy sheriff's department, and this was later.

MR. MALONEY: What do you mean later?

THE WITNESS: Well, that particular day, after that discussion with Officer Brads, we felt that Mike had not broken down based on that two-way discussion between Officer Brads, Officer Smith and [p. 452] myself, that Mike had been stopped for speeding and not for a breakdown.

So it was the next day afternoon that I terminated Mike based upon that information. Subsequent to that, because it was going to grievance proceeding, we felt that we probably needed a statement from Officer Smith.

So we contacted Officer Smith. Went to T-VI, where he was teaching an academy class, young recruits. We talked to him at that time. He had a class going on, there was a lot of -

MR. MALONEY: All right. But you've got a statement from him.

THE WITNESS: Right. We've got a statement from him.

MR. MALONEY: All right. Next question.

Q. (BY MR. JANSONIUS) Is Respondent's Exhibit 18 a copy of that statement?

A. Yes.

Q. Were you present - I'm sorry.

A. I was present. In fact, Officer Smith was semi-conducting this class with another deputy at that time, so there was a lot of confusion going on.

Q. Did you see Officer Smith sign the statement?

[p. 453] A. Oh, he definitely signed it and took a copy of it, I might add.

Q. How did you know that that was Officer Smith?

A. Well, we had trouble finding the portable classroom that this class was being conducted in, and we had stopped at one of the other offices, and they directed us on how to get there and said there would be some people looking for us. And a deputy and a couple of the recruits met us and took us to Officer Smith, introduced us to him, and that's how we know that it was him. Plus he had on a name tag.

Q. Is there any difference between this statement as you see it now and as it was presented to you at the time officer Smith signed it?

A. No.

MR. JANSONIUS: Your Honor, I offer Respondent's Exhibit 18 into evidence.

MR. HARRIS: I object, it's hearsay.

MR. JANSONIUS: Your Honor, it's not hearsay, because we're not offering it for the truth of what's being

asserted, we're offering it for the purpose of showing what ABF knew and relied upon in deciding to terminate Mr. Manso.

MR. MALONEY: He said he didn't have that [p. 454] until after he had fired him.

MR. JANSONIUS: Well, it's still relevant to the company's ultimate decision not to put him back to work in connection with the grievance he filed.

MR. MALONEY: Rejected. It's hearsay.

Q. (BY MR. JANSONIUS) Had you spoken to Officer Smith before a decision was made to let Mr. Manso go?

A. You know, I don't know if I talked to him directly or if it was through Officer Brads before we made - no. I had not talked to Officer Smith directly when I made the decision to discharge Mike.

Q. Why did you discharge Mr. Manso?

A. We discharged him for being tardy a second time with what we felt at that time was not just cause.

MR. MALONEY: If he had had a breakdown, and you were satisfied that he truly had broken down on the freeway -

A. He would not have been discharged?

Q. He would not have been discharged?

A. No, sir, he would not.

MR. JANSONIUS: Your Honor, I pass the witness.

MR. MALONEY: Would this be an appropriate time for a recess?

* * *

[p. 456] here, Mr. Fultz?

All right. This hearing will be in order.

Mr. Fultz, I remind you, sir, that you're still under oath.

Do you want to examine him?

MR. HARRIS: Yes.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Fultz, my name is Lewis Harris, and I'm an attorney with the National Labor Relations Board, and I'd like to ask you some questions.

Since the preferential list was established in April of 1989, how many employees have been taken from that list and made regulars?

A. None.

Q. And since that list was established in April of 1989, how many preferential hires on that list have been discharged?

A. It's either four or five. The exact number I don't remember. I'd have to count through them.

Five.

Q. Five.

And at the present time you say there are seven on the list?

A. That's correct.

* * *

[p. 463] is?

A. The policy - yes. It would come from there and from branch manager and from our regional vice-president and through their discussions.

Q. And would you think that Mr. Johnson would be competent to inform you of what the disciplinary policy of the Albuquerque terminal is?

A. Certainly.

Q. And with regard to - speaking about policy, there was one that you weren't aware of at the time that Mr. Manso was late the second time; isn't that true?

A. At that time, that is correct. The first time, when he was late the first time, I was not aware of what the established policy was going to be as far as a second tardy was concerned.

Q. So you consulted -

MR. MALONEY: Well, are you saying that up until that time there was no established policy?

THE WITNESS: He was the first preferential casual we had ever be tardy.

MR. MALONEY: So up until that time there was no established policy?

THE WITNESS: That policy had not been established at that time.

* * *

[p. 470] A. My boss asked him a couple of questions. I don't -

Q. Your boss?

A. My boss.

Q. Who was that?

A. He was also there.

Q. Oh, I didn't hear that.

A. Yeah. Mike Long was also present.

Q. At this initial conference?

A. Yes.

Q. Okay. What did Mr. Long ask him?

A. I don't remember what the questions were. I really don't. I can't recall.

Q. Was there anything else that happened in the meeting that you remember?

A. Not at that time. I remember that Mike was the one who ended the meeting and said that - I'm talking about Mike Long, branch manager. He ended the meeting basically stating that he wanted to check out some things that were said. And that was the end of the meeting.

MR. MALONEY: Was anything said about him being stopped or slowed by a police officer for speeding?

THE WITNESS: Not at that time, because we [p. 471] didn't know anything about that at that time.

Q. (BY MR. HARRIS) And Mr. Manso didn't say anything about that?

A. No, he did not.

Q. What happened next?

A. Wait.

Q. Excuse me.

A. Wait, wait, wait. That's not true. Let me think a second. These - all these other conversations, and it's been a long time - no. He did not say anything about being stopped for speeding. He did not. It was car broken down. Speeding was not mentioned in that meeting.

Q. Okay. What happened next? What did you do next about this incident?

A. I called Officer Brads, and - my branch manager first had gone and checked the freeway to see if the vehicle was there. The vehicle was not there.

MR. MALONEY: You mean Mr. Long got in his car and went out on the freeway to look for this automobile?

THE WITNESS: That is correct.

Q. (BY MR. HARRIS) Did he ask - excuse me. I want to go back a bit.

Did Mr. Long ask Mr. Manso exactly where it [p. 472] was?

A. Yes. He told us where it was. He told us it was between - somewhere between Louisiana and San Pedro or San Pedro and Carlisle. I can't remember exactly. But those street names come to memory. We're talking, you know, some time has passed here.

Q. Did he say which direction he was heading?

A. Yeah. It was west, of course.

Q. That's what he said? Excuse me?

A. Yes.

Q. And he gave the location of the automobile at that meeting with Mr. Long?

A. (Witness nods head.)

Q. You'll have to answer -

A. Within that area. Within the area enough that if Mike felt if it was there it would still be there.

Q. Well, you don't know what Mike felt.

A. That's true. I don't. I'm just relaying what -

Q. The next thing you know Mr. Long is off - he tells you he's going to go look for the car? Is that what he says?

A. He says, "I'm going to see if that vehicle is there, if there is a vehicle there."

[p. 473] Q. Then what happened next?

A. I called the deputy sheriff's - or the sheriff's department and talked to the on-duty officer, dispatcher, which was Officer Brads. I relayed that information that I

would like to speak to Officer Smith about an incident of stopping an employee of ours that morning and see if he could shed any light on it.

He called back -

Q. Excuse me. At this point you had developed some suspicions.

A. Yes.

Q. Why?

A. From that meeting that morning with Mike, he was evasive with some of the questions we had asked, and we felt that it wasn't a truthful statement that he was making.

Q. The one question that you said that he didn't think he had to answer, it was not relevant, was when he had left home, right?

A. Um-hum.

Q. What other questions did he -

A. Mike asked some. I do not remember what those questions were.

Q. So you developed this suspicion and called officer - or sheriff, Deputy Sheriff Brad, did you say?

[p. 474] A. Brads.

Q. Brads? Is that B-r-a-d-s?

A. I believe that's correct. I -

Q. And what was your conversation with Deputy Sheriff Brads?

A. It was basically a query if he would find out from Officer Smith if he had, in fact, stopped and rendered aid to one of our employees that morning.

He called back and indicated to me at that time that Officer Smith had not rendered aid, that he had stopped Mike for speeding. And there may have been a couple of other statements that were made at that time, but that was it.

Q. Let's go back to the meeting again with Mr. Long and the union steward, Mr. Manso and yourself.

Did Mr. Manso state then to you and Mr. Long that the officer had - he had asked the officer for help with his car trouble? Is that what he said to you?

A. No.

MR. MALONEY: Tell me, did you inquire from Mr. Manso what the nature of his car trouble was?

THE WITNESS: Yes, I did.

MR. MALONEY: What did he say?

THE WITNESS: He told me that the radiator, [p. 475] the heater core on the radiator - heater core, radiator, under there broke and that there was water, hot water, steam all over the whole inside of the car, that the car was completely totally fogged up. He couldn't see a thing out of it. And he had just been driving it into the ground to try to get to work.

MR. MALONEY: But he didn't indicate how he got to work?

THE WITNESS: I'm sure that he did.

MR. MALONEY: What did he say?

THE WITNESS: But I don't remember. I don't remember that part of it.

MR. MALONEY: Did you inquire as to how he made it to work or what became of the vehicle after it had overheated?

THE WITNESS: That was all a part of that conversation, I'm sure, because, of course, I would have been interested in how he got to work and that type of thing.

MR. MALONEY: Well, what did he say about what he did with the vehicle and how he got to work?

THE WITNESS: Well, it was my understanding that the vehicle was still there, because it wouldn't run. It was so overheated and hot that it just quit.

MR. MALONEY: Did he say how he got to [p. 476] work?

THE WITNESS: I really don't remember that part of it.

MR. MALONEY: Did he say -

THE WITNESS: I can say way I assume he said, but I don't remember.

MR. MALONEY: Did he say he called his wife and asked -

THE WITNESS: Yes, he did. He did say - no. Wait a minute. You've got to remember that these conversations have taken place at many different times along the line.

MR. MALONEY: I'm talking about the first conversation.

THE WITNESS: I know that, and that's why I'm trying to remember.

MR. MALONEY: All right. Go ahead, Mr. Harris.

Q. (BY MR. HARRIS) What happened after your conversation with Deputy Sheriff Drabs?

A. Brads.

Q. Brad, excuse me. I'm sorry.

A. Brad or Brads. Deputy Brads, I believe.

Nothing happened until the next afternoon, and the next afternoon the determination was made [p. 477] between the branch manager and myself over discussing this, based on the information from the deputy sheriff and what Mike had told us in the meeting, that we would terminate, and we did.

Q. Now, you say the next afternoon.

Wasn't it the same afternoon?

A. No. As a matter of fact, it was not. It was the next afternoon.

MR. MALONEY: So you allowed him to finish the shift that he had come in to work?

THE WITNESS: Yes, sir. He did finish that shift.

MR. MALONEY: Do you know how he got home?

THE WITNESS: No, sir, I don't.

MR. HARRIS: What was your question, sir?

MR. MALONEY: I just asked if he know how Mr. - Mike had gotten home, and he said no, he didn't.

Q. (BY MR. HARRIS) What was the information that Deputy Sheriff Brads had given you again?

A. That Officer Smith had stopped him - excuse me - had stopped him for speeding.

Q. Did you speak with Mr. Manso again about the matter after this information?

A. Mike called me the next morning asking questions - no. It wasn't the next morning. It was [p. 478] later in the afternoon, because I had terminated him - he called in, and I terminated - told him at that time that he was going to be released, or he would be discharged for being tardy.

And he called me, I believe, again the next morning after that. I told him his final payroll check would be available for him to pick up. He came in and picked up his checks, and there was a brief discussion over why he was being discharged, and I told him he was being discharged for tardiness.

Q. So after you received the information from Deputy Sheriff Brads, nothing was done until the following afternoon when you had a meeting with him?

A. No. It was done the following afternoon when Mike called in. We had had meetings. I discussed this situation with the branch manager.

Q. On the same day that he was late?

A. That's correct.

Q. And the two of you just discussed the matter?

A. Oh, I'm sure that there was involvement with Howard.

Q. That's Mr. Johnson?

A. Mr. Johnson, right.

Q. From Fort Smith?

* * *

[p. 481] discharged.

Q. What did he say, and what did you say?

A. I told him that he was being discharged for tardiness. I was rather - I was rather noncommittal other than that point.

MR. MALONEY: Tell me, was he really being discharged for tardiness, or was he being discharged for tardiness without having a legitimate excuse?

THE WITNESS: Well, he was being discharged for tardiness, but obviously the fact that he did not have a legitimate excuse played upon this particular offense.

MR. MALONEY: If he had a legitimate excuse, he would not have been discharged?

THE WITNESS: He would not have been discharged.

MR. MALONEY: Did all three of you agree, you, Mr. Long and Mr. Johnson, agree, in effect, he was lying when he concocted this story?

THE WITNESS: I believe we did.

And I will add to that, if I may.

MR. MALONEY: Yeah.

THE WITNESS: There was actually some discussion of his dishonesty in this particular incident.

[p. 482] MR. MALONEY: All right. That's all I wanted to know.

Q. (BY MR. HARRIS) Did you confront Mr. Manso with those allegations?

A. No. I did not, because we proceeded to terminate for tardiness.

Q. You didn't give him an opportunity to defend himself against your allegation of dishonesty?

A. We did not have any further discussion on it.

Q. When did you contact the Deputy Sheriff Smith? Was that before the grievance committee meeting?

A. Yes, it was.

Q. Is this progressive discipline policy that you talked about applied with respect to different types of offenses by employees? In other words, if you do not understand my question, can someone be late and get a warning and then not respond to a call and also get a warning because of a different type of offense than being late?

A. That is correct.

Q. So you categorize offenses -

A. That is correct.

Q. - by character, by -

A. That is correct.

* * *

EXCERPTS OF CHRISTOPHER LOVATO

* * *

[p. 378] A. Yes.

Q. Was there any adjustment made to provide for the fact that regulars had been hired in the intervening months, from June to April?

A. Not to my knowledge.

MR. HARRIS: That's all I have.

MR. JANSONIUS: Nothing further, Your Honor.

MR. MALONEY: Thank you. Step Down.

Do you want to recess?

MR. JANSONIUS: Just for a couple minutes. We're informed that our next witness is on his way.

MR. MALONEY: All right. We'll take a five-minute recess.

(Proceedings in recess.)

MR. JANSONIUS: Your Honor, my next witness is going to be Chris Lovato.

Can I have him take the stand?

MR. MALONEY: Mr. Lovato, take the stand, please. Raise your right hand.

CHRISTOPHER LOVATO

Having been first duly sworn according to law, upon his oath testified as follows:

[p. 379] MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: Christopher Lovato, address is 4527 Downey, Northeast, Albuquerque.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. Lovato?

A. ABF Truck Lines.

Q. What do you do there?

A. Operations supervisor.

Q. How long have you been an operations supervisor at ABF?

A. Six, seven years.

Q. Were you involved in the decision to quit using Michael Manso as a preferential casual last summer?

A. No.

Q. Do you recall when Mr. Manso started back to work in approximately late April or early May of 1989?

A. I remember him coming back to work. Yes.

Q. Did you tell Mr. Manso at that time that ABF was gunning for him?

A. No.

Q. Have you ever said anything like that to [p. 380] Mr. Manso?

A. No.

Q. Have you ever threatened Mr. Manso that he was going to be retaliated against in any fashion?

A. No.

MR. JANSONIUS: That's all, Your Honor.

MR. MALONEY: Cross examine.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. Lovato, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and I'd like to ask you a couple questions.

When Mr. Manso came back to work, you knew at that time that he had filed a grievance about his earlier termination, didn't you?

A. No, huh-uh. I don't get involved.

Q. You knew that he had filed an unfair labor practice charge with the -

A. No.

Q. You didn't know that.

Do you know why he had been off of work for a period from June of '88 until April of '89?

A. No.

Q. You had no idea why he was off?

A. Terminated. He was a casual.

EXCERPTS OF MICHAEL MANSO

* * *

[p. 88] MR. JANSONIUS: No further questions.

MR. MALONEY: Thank you, step down. Please be seated and give your name and address to the reporter.

MR. MANSO: My name is Michael Manso. I live at 720 Muriel, Northeast, 87123 is the zip code.

MICHAEL MANSO

having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Are you presently employed, Mr. Manso?

A. Yes, I am.

Q. What is that employment?

A. I am self-employed. I started my own business, a recycling business.

Q. When did you first start work with ABF?

A. It was in April of '87, or the midsummer of '87.

Q. What job were you hired for at ABF at that time?

A. I was hired as a dock worker, casual is what I understood my position to be.

Q. Who hired you?

* * *

[p. 108] sustain the objection.

Q. (BY MR. HARRIS) Just for the clarification of the record, Ralph is Ralph Johnson the union secretary-treasurer?

A. Right, he was the one giving us the information.

Q. Did you return to work at ABF after your discharge on June of 1988?

A. After the grievance was heard in Washington, I did.

Q. Do you remember when you returned to work?

A. It was in April or the beginning of summer of that year. Right after the grievance procedures were heard, they put us back to work - I mean, they put us on a preferential hiring list, that would have been April of that year.

Q. Now, when you returned to work, what job did you return to?

A. I returned to the same job I had before, was dock worker, casual.

Q. And after you returned to work, did you have any conversations with any of the dock supervisors about your return to work?

A. Yeah, they - I talked to several of them at different times.

[p. 109] Q. Did you have a conversation with Chris Lovato?

A. Yes, Chris Lovato. I had spoke with Chris.

Q. How long after you came back to work do you recall that?

A. It was, I'd say about, no shorter than a week, no longer than a week.

Q. Where did that conversation with Chris take place?

A. It was in my assigned trailer.

MR. MALONEY: In your what, sir?

THE WITNESS: My assigned trailer, they assign you to break, take the freight out and put in other freight.

Q. (BY MR. HARRIS) All right. And will you please relate what he said and you said, if anything?

MR. JANSONIUS: I object to hearsay again.

MR. MALONEY: What grounds?

MR. JANSONIUS: Hearsay.

MR. MALONEY: Is he a supervisor?

MR. HARRIS: Yes, he's a supervisor, alleged and admitted.

MR. MALONEY: Well, it's not hearsay.

[p. 110] MR. JANSONIUS: I repeat my objection in that there is no foundation laid, that anything Mr. Lovato did - had no authority over employment practices.

MR. MALONEY: Well, he is a supervisor. It may very well be - I don't know what he's going to say. It may show animus, could show policy, could show you a lot of things. Go ahead.

THE WITNESS: Chris Lovato said I had better watch my step, that ABF was gunning for me.

Q. (BY MR. HARRIS) What did you say, if anything?

A. I told him that I'll definitely do that.

Q. Do you recall a conversation with Tom McNutt after you returned to work?

A. Yes, I do.

Q. Approximately how long after you returned did that conversation take place?

A. It was just a few days after I had talked to Chris.

Q. Where did that conversation take place?

A. In and around my assigned trailer.

Q. Was anyone else present?

A. No.

Q. Would you relate, as best you can, what [p. 111] Mr. McNutt said and what you said, if anything?

A. Yes, Mr. McNutt had come up to me and told me that he personally didn't have nothing to do with me being terminated. But that what I did I had to do, and you won. But he noticed I had been coming to work with a pissed-off attitude, is the words he used, and then again stated that he had nothing to do with my termination.

I told him "Well, you know, okay." And I was listening to him, because he was coming in with this speech to me and he was concerned about my attitude.

He said, "What ABF did was wrong, but what you should do is try to come with a good attitude and work with me and things will be a lot easier for you and I around here."

MR. MALONEY: But you were on the preferential list at that time?

THE WITNESS: Yes, sir.

MR. MALONEY: Were you given any indication that you would be trained to receive truck driving qualifications?

THE WITNESS: Not from any - not from any supervisor, I didn't.

MR. MALONEY: All right. Go ahead, Mr. [p. 112] Harrison.

Q. (BY MR. HARRIS) Did he make any reference to higher echelon?

A. Yes.

MR. JANSONIUS: Objection. Now, we're talking hearsay on here.

MR. MALONEY: No, we're not. Overruled. Go ahead.

THE WITNESS: In the same conversation, Mr. McNutt also told me that I should watch to be - the way he said it was to be careful because the higher echelon was after me.

Q. (BY MR. HARRIS) Did you say anything to him about any of these remarks he made?

A. I told him, "Thank you for coming to me and talking to me on your feelings," and that was about it; that I would take his advice. There was another incident with another foreman.

Q. I'll get to that. And who was that other foreman?

A. It was Kyle Beeson.

Q. And when he spoke with you, how long was it after you had returned to work?

A. It was just shortly after - a day or two days. This all happened real fast because everybody [p. 113] was all surprised that we made it back on the dock.

Q. Where did you have this conversation with Mr. Beeson?

A. Right there in front of the assignment sheet where the foremen stand, right there where - right there where they stand at.

Q. Was anyone else around?

A. Yes, there was other employees around.

Q. Do you know who they were?

A. I can't give you any names, but there other men there.

Q. What did Mr. Beeson say?

A. As I approached him walking up to the assignment sheet, he said, "Well, it looks like you made it back.

let's see how long it takes them to get rid of you this time."

Q. What did you say, if anything?

A. I just kind of looked at him and didn't really say much.

(General Counsel's Exhibit 3 marked.)

Q. I'm going to show you a document that I have marked General Counsel's Exhibit 3 and ask you to take a look at that, let me know if you have seen that document before.

A. Yes, I have.

* * *

[p. 116] months after.

MR. MALONEY: What month of what year was it?

THE WITNESS: It had to have been November, middle of November.

MR. MALONEY: Of what year?

THE WITNESS: 1988.

MR. MALONEY: Was it before you went back to work?

THE WITNESS: Yes, sir.

MR. MALONEY: Okay, go ahead.

Q. (BY MR. HARRIS) Were you home by your phone on May 6th when this call would have been made?

A. Yes, sir.

Q. Did you receive any call?

A. The phone didn't ring.

Q. Did you talk to anyone at ABF about this letter dated May 8th, any supervisor at ABF about a letter?

A. I had talked to a supervisor, I don't recall the supervisor's name, but I inquired as to who made the call. I wanted to know who called me and what was the letter all about.

Q. What did the supervisor tell you?

[p. 117] MR. JANSONIUS: Your Honor, I object on hearsay again, there is no - no identification, even of the supervisor.

MR. MALONEY: Who did you speak with - doesn't make it hearsay, though.

MR. JANSONIUS: Makes it impossible for me to cross-examine on something when I don't know who is being talked about.

MR. HARRIS: He says he doesn't know.

Q. (BY MR. HARRIS) If I may suggest, would it have been Ron Ford?

A. That is right. It was Ron Ford.

MR. JANSONIUS: I'll object to leading.

MR. MALONEY: Well, did you want to know who the supervisor was?

MR. JANSONIUS: Yes, but I didn't want general counsel telling him who it was.

MR. MALONEY: Well, now you know. What did you say to Ford? What did Ford say to you?

THE WITNESS: Ford told me that Jeff Motter had called to verify the call, that is a fellow Teamster and -

MR. MALONEY: What do you mean "verify the call"?

THE WITNESS: Well, see, that is the thing [p. 118] that ABF started doing, they would have a fellow Teamster verify whether or not ABF called you.

MR. MALONEY: Did he tell you which supervisor had placed the call?

THE WITNESS: Ron Ford is the supervisor.

MR. MALONEY: Did Ron Ford tell you which supervisor had called you?

THE WITNESS: Yeah, it was on his shift.

MR. MALONEY: Did he place the call?

THE WITNESS: Yes, he did. Well, it wasn't him that placed the call, he was present at the time that Jeff Motter -

MR. MALONEY: So he asked Motter to call you?

THE WITNESS: That's right.

MR. MALONEY: And Motter called you in his presence?

THE WITNESS: Right.

MR. MALONEY: And why did they do that?

THE WITNESS: To verify whether or not you are home by the phone.

MR. MALONEY: Was it a new procedure or old procedure?

THE WITNESS: To my understanding, it was a new procedure. I wasn't familiar with it.

[p. 119] MR. MALONEY: Go ahead.

THE WITNESS: And he told me that Motter was the one that verified the call.

MR. MALONEY: He verified the call? He made the call?

THE WITNESS: Yeah, he made the call.

MR. MALONEY: All right, let's go.

THE WITNESS: So after that I went and talked to Motter, I said, "Jeff, did you call my house? What number did you call?"

He said, "I called, but when I was dialing the number, I felt I had made a mistake in dialing your number."

I said, "Why didn't you dial it again?"

He said that Ron Ford wouldn't let him dial it again, and I've got that in a - I had him sign a statement to that effect. Because of the grievance procedures, I needed some proof of what was going on.

Q. (BY MR. HARRIS) Prior to this use of the fellow teamster to make the call - or to verify the call is the term, I guess, that is used over there - who had made the

calls when you worked there from April '87 to June of '88? Who called you to come into work?

* * *

[p. 125] MR. MALONEY: Did you attend the meeting?

THE WITNESS: I did not attend. I was there at that meeting, but I didn't stay for that particular item, they didn't address it. They had me there on another item of discharge and I stayed there and listened to that, and I was upset at the fact that they didn't put me back to work, so I just left. I wasn't real concerned with that money at that time, but I was there, in Arizona.

MR. HARRIS: Up until -

MR. MALONEY: Off the record.

(Off-the-record discussion.)

(Recess held.)

Q. (BY MR. HARRIS) Mr. Manso -

MR. MALONEY: Just a moment. This hearing will be in order. I remind you that you are still under oath.

Q. (BY MR. HARRIS) I'm going to direct your attention to August 11th, 1989. Were you late to work on that day?

A. Yes.

Q. How late were you?

A. Four minutes late.

Q. Did you receive a warning letter because of that lateness?

[p. 126] A. Yes, I did.

Q. I'll show you what is in evidence as Respondent's Exhibit 16. Is that the letter you received?

A. Yes, this is the letter.

Q. Did you speak with anyone at the company in supervision about that letter, that particular letter, after you received it?

A. No, I don't believe I did.

Q. Did you file a grievance on that particular letter after you received it?

A. No, because that was my first letter for being late and, like I stated, previous to that, the letters were not being grieved unless it is a termination or a suspension.

Q. Directing your attention to August 17th, 1989, were you again late on that date?

A. Yes, I was.

Q. Would you explain the circumstances surrounding -

A. I had -

Q. - your being late that day?

A. I was on my way to work in the morning for the 5:00 shift, and I had called ABF to tell them I was having car trouble and that I would be in late, [p. 127] but I would be in.

I talked to Joe Kennera, the supervisor on duty, and he said, "Okay, I'll make a note of it."

Q. Do you recall how soon before the shift that you called that you had the car trouble?

A. How soon before the shift I called to let them know I was going to be late?

Q. Yes.

A. I called 24 minutes after the hour of 5:00.

MR. MALONEY: AM? PM?

THE WITNESS: AM, 5:24 is when I called.

MR. MALONEY: What time were you due in - so you called 24 minutes late, is that right?

THE WITNESS: I called in 24 minutes late to let them know I would be late. I was having car trouble. I had called from a pay phone. When my car broke down, I walked to the nearest pay phone from the freeway.

I called from the phone and talked to ABF, and I spoke to Joe Kennera, and he said he would make a note of it. Then I called my wife, and my wife came and picked me up from the pay phone I was at.

MR. MALONEY: Where were you located?

[p. 128] THE WITNESS: The pay phone.

MR. MALONEY: Where in Albuquerque were you located?

THE WITNESS: Where do I live?

MR. MALONEY: Where were you located when you broke down?

THE WITNESS: I was at - in between the San Pedro and Carlisle exit.

MR. MALONEY: Of what?

THE WITNESS: I-40.

MR. MALONEY: Okay. Go ahead.

THE WITNESS: There is not an exit at San Pedro, it is the San Mateo exit. There is an exit at San Mateo and Carlisle, it was in between that stretch of San Mateo and Carlisle. I made a mistake, I broke down in between that stretch.

I got out of the car, hopped the fence and walked to the nearest pay phone on Carlisle. There is an Exxon station, it is an abandoned Exxon station, I used that pay phone to call ABF and my wife.

My wife then picks me up after she got up out of bed and dressed and all, came and picked me up - got back on the highway to go to ABF and that is when I got stopped by a police officer for [p. 129] speeding.

MR. MALONEY: Where is ABF located?

THE WITNESS: It is on I-25 north, on I-25 just by the Jefferson exit, I guess that is the best description I can give. Does anybody want to help me on that one?

MR. MALONEY: Go ahead.

THE WITNESS: After my wife came and I got in the car, and I said, "Let me drive," and got in and got on the highway, the officer pulled me over for speeding.

MR. MALONEY: What was wrong with your car?

THE WITNESS: It overheated on me. I had broke the heater core, and I had that heater core repaired, and then I did - the next couple days - the two days following my car breaking down, I had it repaired at a shop. The heater core got rusted out and all the water came out and the car overheated. It got so hot it stopped.

So the officer gave me a ticket for speeding, and I explained to the officer I was late for work and I needed to get there in a hurry.

He said, "I can understand. I've been late for work before myself."

[p. 130] He didn't issue me a citation, and he said, you know, "Just slow down."

So I said, "Okay."

He gave me his badge number and his name, so when I got to ABF, I told the foreman on duty which was - by that time Tom McNutt had arrived for his shift.

MR. MALONEY: What time did you get to ABF?

THE WITNESS: I believe I got there - it must have been, it was ten until 6:00.

MR. MALONEY: You were due at 5:00?

THE WITNESS: Yes, sir.

MR. MALONEY: Okay. Go ahead.

THE WITNESS: It was ten until 6:00 AM, and I punched in, and I went to get my assignment and Tom McNutt took me upstairs and started to write out a

corrective interview is that what they call it. It is a piece of paper that explains what you did and the action that was going to be taken against you for the violation of being late to work.

I told him that I'm not going to sign that piece of paper because that would be agreeing with what you are writing down on there, and I don't agree with what you are writing on there at all. [p. 131] You don't have it right, and we got into a little bit of an argument. I told him, "I'm not signing that piece of paper because it is an incorrect piece of paper."

He had on there the officer pulled me over for assistance. He did not pull me over for assistance. He did not pull me over for assistance, he pulled me over for speeding violation, and it was two separate vehicles - the vehicles.

MR. MALONEY: Had they already called the policeman?

THE WITNESS: Yeah, they got in touch with him.

MR. MALONEY: Before they got you in the office, they called this policeman?

THE WITNESS: No, sir. They immediately take you in when you punch in and then they take you up into the office and they start filling out this piece of paper.

And I had told them that I, also, was stopped by an officer, and I gave them the badge number and the name and that was furthermore why I was late.

MR. MALONEY: What I'm asking you is, by the time this gentlemen had called you into the [p. 132] office to write out this disciplinary warning, the company had already contacted this officer?

THE WITNESS: No, I don't think they - there was no way they could have done that because, you know, the time was just - I had just got there. There was no way they could have called the officer that fast, because I was standing right there and McNutt was there with the paper.

MR. MALONEY: How did he know about what this officer did?

THE WITNESS: I told him.

MR. MALONEY: You mean he put down what you told him incorrectly?

THE WITNESS: Yes, he did. I told him that - I said, "I'm not signing that piece of paper, it's not right."

He got a little bit aggressive with me, and he said, "You have to sign this paper."

And he got offensive - and he being offensive, I got offensive, and before you knew it, we were yelling at each other.

I told him that I wanted to talk to the shop steward. He said, "Fine, when Wally gets here, you talk to Wally. And then you're going to have to sign this paper." And I still didn't sign this [p. 133] paper to this day. That paper hasn't been signed.

Wally got there and got me and got the company together and we kind of talked there on that, and that is what happened as far as me being late that day.

Q. (BY MR. HARRIS) Later that day, were you called into the office for a meeting with Mike Long and Ed Fultz?

A. Yes, I was called into the office several times that day. They were having trouble trying to determine whether or not - what to do with me being late the second time, that's the impression I got, because they kept calling me in there and asking me questions and questions - they were interrogating me, as I call it.

I said, "What difference does it make why I was late, I was late. What is with all the questions for what reason I was late?"

They were saying that we are trying to check out your story. And that doesn't make any difference to me, I was late, I was late, what difference did it make.

Q. How many times were you called into the office there?

A. Three separate times during the shift.

[p. 134] MR. MALONEY: When your wife came to your assistance, what did she do? Did she come where you were broken down on Interstate 40?

THE WITNESS: No, because I would have had to walk a long ways to get to the car, where my car was, and I stayed there at the pay phone.

MR. MALONEY: Did she go to the pay phone?

THE WITNESS: Yes.

MR. MALONEY: What happened then?

THE WITNESS: I said, "Get out, I'm driving it. I got to get to work."

She got in the passenger side; I drove the car to work.

MR. MALONEY: So you just abandoned the other car?

THE WITNESS: Oh, yeah, I just left it on the side of the road. The officer didn't even see the other car. Yes, I just left it there.

MR. MALONEY: So you and your wife both went to work, she dropped you off -

THE WITNESS: Yes.

MR. MALONEY: - and went home?

THE WITNESS: And went home. She was in her pajamas. So that is what happened, why I was

* * *

[p. 152] speculation.

MR. MALONEY: What time did your wife get there, as best you can?

THE WITNESS: I really don't know what time she got there.

MR. MALONEY: Was she in the car when the policemen pulled you over?

THE WITNESS: Yes, sir.

Q. (BY MR. JANSONIUS) Just to get the sequence straight, it takes about 10 to 15 minutes to get from your house to the San Mateo exit, is that correct?

A. Yes, sir.

Q. And about 5:25 AM, you called your wife, she was at home, and you asked her to come pick you up at that Exxon station that you had walked to, is that correct?

A. Yes, sir.

Q. So if it would take her 10 or 15 minutes to get to that spot, the earliest she could have gotten there would be about 5:45 or 5:35 at the earliest?

A. I guess you could say that, if you like.

Q. Then from there, you got on the highway and started driving back towards the terminal, is [p. 153] that correct?

A. That's right.

Q. How long does it take to get from the Exxon station off the San Mateo exit on I-40 to ABF's terminal on I-25 at the Jefferson exit?

A. It should take about ten minutes. At the rate of speed I was traveling, it would have taken a lot less than that, from what the officer said.

Q. En route, you were pulled over by the officer, is that correct?

A. Yes, I was.

Q. How long did he detain you?

A. How long? Just very shortly, just to tell me to slow down, and he didn't give me a ticket.

Q. Then from there you got to the terminal, and you say you got to the terminal about 5:40, is that correct?

A. I believe I punched in about ten minutes to 6:00, that is what my time card said - no five until 6:00, ten until 6:00, something like that.

Q. You filed a grievance over that termination, isn't that right?

A. Yes, sir.

Q. And that went up to the Arizona-New Mexico Joint State Committee, is that correct?

[p. 154] A. Yes, sir.

Q. And it sustained your discharge, didn't it?

MR. HARRIS: Objection to this line of questioning. It is beyond the scope of direct.

MR. MALONEY: Overruled. We all know they sustained it, otherwise we wouldn't be here.

THE WITNESS: Yes, they did.

MR. HARRIS: I was objecting to the entire line regarding the grievance filed after his discharged.

MR. JANSONIUS: I'll pass the witness.

MR. HARRIS: No questions.

MR. MALONEY: Thank you very much. Step down.

(Witness excused.)

MR. MALONEY: Who is your next witness?

MR. HARRIS: Jeff Motter, M-o-t-t-e-r.

MR. MALONEY: Come forward, Mr. Motter. Please be seated and give your name and address to the reporter.

MR. MOTTER: Jeff Motter, M-o-t-t-e-r, 53 Bobolink Lane, Tijeras, it's New Mexico, 87059.

* * *

[p. 505] MR. MALONEY: Which one were you driving to work that broke down because it overheated?

THE WITNESS: My car.

MR. MALONEY: What kind of a vehicle is that?

THE WITNESS: It's a '72 Ranchero.

MR. MALONEY: And what kind of a car did she come and pick you up in?

THE WITNESS: She came and picked me up in a '78 Dasher, Volkswagen Dasher.

MR. MALONEY: When you were stopped by the police, what kind of a vehicle were you driving?

THE WITNESS: A '78 Volkswagen Dasher.

MR. MALONEY: And you were driving it even though it was her car?

THE WITNESS: Yes, sir.

MR. MALONEY: Where was she sitting?

THE WITNESS: In the passenger seat.

MR. MALONEY: How did you remove that '72 Ranchero from the freeway, or wherever it was that it was broken down?

THE WITNESS: I had my wife - I told my wife when she dropped me off from work to get my brother to get his truck to take my car home, pull the car home, so we could fix it.

EXCERPTS OF THOMAS MCNUTT

* * *

[p. 408] MR. MALONEY: All right. Bring them in.

MR. JANSONIUS: Your Honor, our next witness is Tom McNutt.

MR. MALONEY: Tom McNutt?

MR. JANSONIUS: Yes.

MR. MALONEY: All right. Come forward, please. Raise your right hand.

THOMAS C. MC NUTT

having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Be seated, give your name and address to the reporter.

THE WITNESS: You want me to give my name and street address?

MR. MALONEY: Yes.

THE WITNESS: Me name is Thomas C. McNutt, Junior, my address is 1155 Chiquitos Road, Bosque Farms, New Mexico.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Where do you work, Mr. McNutt?

A. I work for ABF Freight System.

Q. And how long have you worked there?

[p. 409] A. I've worked for ABF since March of 1983.

Q. What's your job at ABF?

A. Operations supervisor.

MR. MALONEY: Is that the same as a foreman?

THE WITNESS: Yes, same as a foreman. That's our official title.

Q. (BY MR. JANSONIUS) How long have you been an operations specialist?

A. Since I was hired in 1983.

Q. So you worked on the dock in the spring and summer of 1989; is that correct?

A. I did.

MR. MALONEY: What is your basic job as operations supervisor? What do you do all day?

THE WITNESS: I am responsible for inbound and outbound freight, loading trailers, unloading trailers, calling crews, manning, that type of thing.

MR. MALONEY: Do you do any work yourself?

THE WITNESS: No, sir, I do not.

MR. MALONEY: So you oversee other people?

THE WITNESS: Yes, I do.

MR. MALONEY: Okay. Go ahead.

Q. (BY MR. JANSONIUS) Do you recall when Mr. Manso returned to work on the dock in late April or the [p. 410] beginning of May of 1989?

A. Yes, sir.

Q. Did you have any discussions with him at that time?

A. No. The only discussion I had with Mr. Manso was after he came back to work, I approached him, shook his hand, told him I was glad to see him back, that I did not have any involvement in anything that had gone on, and that I never had any problem with any work he had ever done, and I expected us to have a good working relationship from that point on.

Q. At any time did you tell Mr. Manso that the higher echelon of ABF was after him?

A. No, sir.

Q. Did you ever tell him that ABF-was out to get him?

A. No, sir, I did not.

Q. Did you ever threaten any kind of retaliation against Mr. Manso for any of his activities?

A. No, sir.

MR. JANSONIUS: No further questions.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Mr. McNutt, my name is Lewis Harris, I'm an attorney with the National Labor Relations Board, and

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EXCERPTS OF JEFF MOTTER

* * *

JEFF MOTTER

[p. 155] having been first duly sworn according to law, upon his oath testified as follows:

DIRECT EXAMINATIONBY MR. HARRIS:

Q. Mr. Motter, are you appearing here under subpoena that I issued to you or had issued to you?

A. Yes, I am.

Q. Are you presently employed by ABF?

A. Yes, I am.

Q. How long have you been employed by ABF?

A. About four years full-time, six years altogether.

Q. What is your job with ABF now?

A. Dock man, checker.

Q. How long have you had that job?

A. Four years, about.

Q. Is that considered a regular position?

A. Yes, it is.

Q. Do you recall the procedure for calling casuals having been changed sometime during 1989?

A. Yeah, you might say it changed.

Q. What is your view of how it changed?

A. Well, when I was a casual, they'd call you

* * *

[p. 159] Q. (BY MR. HARRIS) Directing your attention to that date, June 19th, when you did call Mr. Manso, would you explain what happened that day and what conversation you had with the supervisor who was there at the time you made the call?

A. Yes, I was working a midnight shift, I believe, and we were probably calling him for 8:30, which would have made it between 5:30 and 6:30 in the morning, so it was probably around 6:00 in the morning.

So at that time, I probably had been up for 22, 23 hours without any sleep. And, normally, when we call teamsters - if a supervisor calls a teamster, a regular full-time employee, and he's unable to get ahold of him, he has an hour to answer up, then towards the end of that hour he'll get a teamster to verify that he has tried to call him and he is not home. And normal procedure is you'll go in and call a couple times and try to get through to him; then you sign a statement that you did, in fact, try to get ahold of him.

Then if there's a question, the Teamster can come to you and say, "How come you couldn't get ahold of me." I'm not sure if this was the first time I had called a preferential casual, or the

* * *

[p. 160] first time I hadn't got ahold of one.

I wasn't even careful about how I was calling, because you call two or three times. And this time I dialed Mike, and very likely, I misdialed the number. And the supervisor that was there wouldn't let me redial, but I wasn't - and I told him at that time that it wasn't right. In fact, I'm sure I dialed the wrong number.

Q. Who was the supervisor?

A. Ron Ford.

Q. Have you had a tardy record at the company at all?

A. Not any worse than anybody else that works under the conditions that I work under.

MR. MALONEY: That doesn't tell me a thing.

Q. What kind of tardy -

A. First of all, I have to tell you, a 15 percenter, what I do most of the time, I can be on call 24 hours a day, seven days a week, and you can even work two shifts a day.

They can call you in at 2:30 in the morning, have you come in at 5:00, working until 1:30 in the afternoon, and call you back at midnight, without any sleep, and work you until 8:30

EXCERPTS OF DEPUTY SHERIFF SMITH

* * *

[p. 509] Let's take about a five-minute recess.

(Proceedings in recess.)

MR. MALONEY: On the record.

Call your next witness.

MR. JANSONIUS: Your Honor, I call Officer Derryl Smith. He's on his way in.

MR. MALONEY: Mr. Smith.

MR. JANSONIUS: Officer Smith, if you would take the stand up here, please.

MR. MALONEY: Raise your right hand, sir.

DERRYL SMITH having been first duly sworn according to law, upon his oath testified as follows:

MR. MALONEY: Would be seated, give your name and address to the reporter.

THE WITNESS: Derryl Smith, at 400 Roma, Northwest.

DIRECT EXAMINATION

BY MR. JANSONIUS:

Q. Officer Smith, who do you work for?

A. Bernalillo County Sheriff's Department.

Q. What do you do there?

A. Deputy sheriff.

[p. 510] Q. How long have you been with the Bernalillo County Sheriff's Department?

A. Going on eight years.

Q. What are your responsibilities as a deputy sheriff?

A. Enforce traffic laws, protect property, ensure the safety of the citizens.

Q. How long have you worked for the sheriff's department?

A. Eight years.

Q. Officer Smith, I'd like to show you a document that has been offered as Respondent's Exhibit 18 and ask if you would look at that and state whether you can identify that?

A. Yes. That's my statement.

Q. Is that your signature at the bottom there?

A. Yes.

Q. And when you prepared this statement, were the events described in it fresh in your mind?

A. Yes.

Q. Do you recall the incident that's discussed in this report?

A. Yes.

Q. Would you describe the incident that is discussed in Exhibit 18?

[p. 511] A. It was approximately 5:30, 5:40 in the morning. I was en route to the academy.

MR. MALONEY: You mean the police academy?

THE WITNESS: Yes, sir, the police academy. I was a drill instructor there at the time.

He was - we were westbound on I-40, and I observed a vehicle traveling at a high rate of speed. I fell in behind the vehicle and paced him for approximately two miles, three miles, at speeds of eighty-five to ninety miles an hour. I then engaged my emergency equipment and pulled him over.

MR. MALONEY: You mean your siren?

THE WITNESS: Just the red lights. At 5:30 in the morning I'll wake up the people here.

And he pulled over. I approached the vehicle, asked for his driver's license. The individual gave me his driver's license. We were in the transition of the old New Mexico citations and the new ones, and I did not have new citations on me, so I gave him a verbal warning to slow it down.

Q. (BY MR. JANSONIUS) Who is him that you're referring to?

A. Mr. Metto, whatever his name is. I can't -

MR. JANSONIUS: Your Honor, may the record [p. 512] reflect that -

MR. HARRIS: Wait a minute. I don't want -

MR. MALONEY: Is the man in the room here?

THE WITNESS: Yes.

MR. MALONEY: Where is he?

THE WITNESS: That's him right here.

MR. MALONEY: All right. I'll let the record reflect he's pointed to Mr. Manso.

Q. (BY MR. JANSONIUS) Was Mr. Manso by himself on that occasion?

A. Yes, he was.

Q. Did he have any car trouble that you observed?

A. No.

Q. Did he tell you he had car trouble?

A. No.

MR. JANSONIUS: No further questions.

MR. MALONEY: What kind of a vehicle was he driving?

THE WITNESS: If I can remember, it was just passing, it was an - it wasn't a large car. It was a compact vehicle.

MR. MALONEY: Do you know the make or model?

[p. 513] THE WITNESS: No. I didn't even notice that.

MR. MALONEY: You say he was alone?

THE WITNESS: Yes, he was.

MR. MALONEY: There was no woman in the car with him?

THE WITNESS: No, there was not. He was by himself.

MR. MALONEY: Did he give you an excuse for why he was driving so fast?

THE WITNESS: He said he was late for work. That's the only excuse.

MR. MALONEY: All right. Go ahead. Cross examine.

CROSS EXAMINATION

BY MR. HARRIS:

Q. Would you step off the stand, please, and identify Mr. Manso, Officer Smith?

A. I am - it's been quite a while, but this is the gentleman right here.

MR. HARRIS: The gentleman with the dark hair, would you stand up, please?

THE WITNESS: No, no. The one next to him, I believe.

Q. (BY MR. JANSONIUS) The one next to him?

[p. 514] A. Yes.

Q. Okay. That's the one you believe is Mr. Manso?

A. Yes. It's been quite a while.

Q. All right.

A. Can I get back on the stand now?

MR. MALONEY: Yes, go ahead. Please sit down, Officer.

Q. (BY MR. HARRIS) Could the car have been something like a VW Dasher?

A. Yes.

MR. HARRIS: No other questions.

MR. JANSONIUS: Your Honor, I would offer Respondent's Exhibit 18 into evidence.

MR. HARRIS: No objection, Your Honor.

MR. MALONEY: Sustained. There's no reason to offer that. You have his testimony here.

MR. JANSONIUS: Thank you, Officer.

THE WITNESS: Am I excused now?

MR. MALONEY: Anybody wish the officer to remain?

Okay. Step down.

THE WITNESS: Thank you.

MR. JANSONIUS: Your Honor, that is respondent's final witness.

NLRB SECTION 10(b), 29 U.S.C. § 160(b) (1988)

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of

evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.
